IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-5014 & 75-5015

JEFFERSON DOYLE,

Petitioner,

v.

STATE OF OHIO,

Respondent,

and

RICHARD WOOD,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO, TUSCARAWAS COUNTY

PETITIONERS' REPLY BRIEF

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In this case the lines are clearly drawn. The State here contends, without equivocation, that it is not only

proper to cross examine a *Miranda* advised defendant as to his unwillingness to engage in a discussion with his arresting officers, but that such an examination is required (*Respondent's Brief*, p. 10) because "what else can a prosecutor do when faced with exculpatory trial testimony of defendants" who chose to remain silent following their arrest (*id*, p. 36). As to this, the fact that Respondent is willing to fully credit petitioners' version of their participation in this episode, as being an "arguably plausible, story" (*ibid*), emphatically portrays the extent to which Respondent would have his reasoning patterns carry this Court.

While Respondent seems quite comfortable in suggesting that this Court's rejection (in *United States v. Hale*) of significant segments of his argument may have been "made without consideration of certain language in *Miranda*, itself" (*Respondent's Brief*, p. 28), other aspects of its Brief are equally startling–if such is possible.

As to this latter point, it may suffice here to simply note, by way of illustration, Respondent still contends that given the forced explanation made by these petitioners–that "they wanted to get legal advice before they said anything" (*id*, p. 11)–the failure to furnish the substance of their later testimony after counsel was obtained became an additional incriminating circumstance. Here Respondent pointedly contends the fact that petitioners' exculpatory defense was not revealed at the preliminary hearing created a further *right* in the prosecutor to specifically ask them "wouldn't that have been a wonderful time to protest your innocence" (*id*, p. 12).

Granted, "a prosecutor has . . . [a] right to ferret out perjurers by vigorous, impeaching cross-examination"

(*id*, p. 13), but it simply does not follow that this authorizes the prosecutor to compromise fundamental rights protected by the Constitution and the decisions of this Court implementing those rights.

Looking then at the basic contentions made by the Respondent, distilled the position seemingly taken is that the assertion of either the right of silence or the right to confer with counsel following an arrest, or both of them, must be regarded as inconsistent with any exculpatory trial testimony by an accused. Further, that such assertions are circumstances that can be dramatized (in cross examination and argument) as being inconsistent with innocence. It is then reasoned that this is true whether the person being cross examined is a witness or a defendant.

While this Court's decision in *United States v. Hale*, must be regarded as forging a pattern that will have an easy application to state court prosecutions; still the efficacy of our contention that surely this "Court's power as final arbiter of issues raised under the Constitution" is at least as sensitive to the requirements of due process as is the Court's " 'supervising authority over lower federal courts' " (*Brief for Petitioners*, p. 25) is beyond dispute.

Again, Respondent almost aggressively finds solace in still another suggestion made in *Miranda*. Here reference was made to the observation in that opinion to the fact that there are circumstances where it can be assumed a lawyer will advise his client to talk freely with the police (*Respondent's Brief*, pp. 28-29). In urging even this point, it is apparent counsel has chosen to ignore what can be regarded as an essential aspect of *Miranda*. Simply put, this Court there concluded that:

> "In accord with our decision today, it is impermissible to penalize an individual for exer-

> cising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S., at 468, n. 37.

Surely then, this Court will still agree, and find here, that these petitioners were penalized both by being asked, and by being forced to answer, questions dealing with this impermissible area. In our judgment, this certainly makes their case even stronger then *Hale*, where the Court interrupted the questioning and informed the jury they could disregard "the question", which inferentially included the implication that naturally flowed therefrom. In both of the cases here the questions were answered and the points argued.

Viewed from still another posture, as was held in *Johnson v. Patterson*, 475 F.2d 1066 (10th Cir. 1973), "it would indeed be irregular and anomalous to warn an accused he has a right to remain silent, that if he says anything it may be used against him, however, if he does remain silent that too may be used against him . . . . This [however] would be the practical effect of allowing the prosecution to use at trial the fact that the accused remained silent, clearly making the assertion of the constitutional right costly" (475 F.2d, at 1069).

The logic behind the above analysis applies full force, we contend, whether the person who avails himself of the *Miranda* advice testifies as a mere witness or as the accused.

II

On the other hand, while the question directed to these petitioners, as to why they would not consent to the warrantless search of the car, may not be governed by *Miranda;* the fact that petitioners were asked to consent to the search certainly implied they were being given a choice in the matter. This added dimension creates a factor which must be reckoned with.

By way of analogy, it is most doubtful that even this prosecutor would argue that the unwillingness of a tenant to submit to a warrantless search of his premises creates an evidentiary advantage for the prosecution. This same principle should apply to the search of movable property as well.

Still another faulty syllogism constructed by the Respondent is premised on the statement that even though the "officers advised defendants of their *Miranda* rights, including the right to remain silent . . . they did not *force* the defendants to remain silent" (*Respondent's Brief*, p. 18). So postured, the conclusion is then drawn that this shows the decision to remain silent was "their own free choice" (*ibid*), therefore, evidence showing this choice becomes relevant and permissible.

The fact that the above reasoning pattern is a *non sequitur* could not be clearer. This is so because *it does not follow* from the fact they elected to remain silent, that such election is inconsistent with innocence. Indeed, the point has been made:

> "[There are] not special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald v. United States*, 353 U.S. 391, at 425-426 (1957). (Concurring Opinion.)

CONCLUSION

In this case, as was held in *Hale*, there was no reason for these petitioners to think, or for that matter to even assume, that *any* explanation by them would have hastened their release. Thus, the suggestion that these petitioners should have ignored the professional advice given them by counsel, who represented them at the preliminary hearing, at the risk of creating an adverse inference, if not asking too much of them was certainly asking too much of their counsel. This thought seems especially compelling since, until now, it had always been deemed sound advice for "any lawyer worth his salt . . . [to] tell the suspect in no uncertain terms to make no statement to the police under any circumstances" *Watts v. Indiana*, 338 U.S. 49, at 59 (1949).

Thus, we again contend, consistent with our view of the thrust of this Court's decision in *Hale*, that silence as exercised by the petitioners in this case was not inconsistent with the defense made by them to the charge for which they stood trial. The same is true of their unwillingness to waive their right to counsel and their right to follow his professional advice.

For all of these reasons, it is again urged that these convictions be reversed.

Respectfully submitted,

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